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No. (1) 09-354

Supreme Court, U.S.
FILED
SEP 22 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

NOEL VILLARREAL,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the evidence insufficient under the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), to support the Petitioner's conviction for violating a protective order by committing an act of family violence, and does the Petitioner's conviction therefore violate his due process rights under the 14th Amendment to the United States Constitution?

2. What is the standard for determining when a variance between a criminal charging instrument and the evidence actually produced at trial constitutes a violation of due process?

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The Court of Criminal Appeals of Texas (the state court of last resort) issued a reported opinion. *Villarreal v. State*, 286 S.W.3d 321 (Tex. Crim. App. 2009). The opinion is reprinted in the Appendix. App. at 1-25. The Court of Appeals for the Second District of Texas did not select its opinion for publication. A copy of its opinion is reprinted in the Appendix. App. at 26-40.

STATEMENT CONCERNING JURISDICTION

The Court of Criminal Appeals of Texas issued its opinion on April 29, 2009. The Court of Criminal Appeals denied Petitioner's timely-filed motion for rehearing on June 24, 2009. App. at 41. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the Court of Criminal Appeal's decision by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

TEX. PENAL CODE ANN. § 25.07 (Vernon Supp. 2008)

. . . A person commits an offense if, in violation of . . . an order issued under Article 17.292, Code of

Criminal Procedure, . . . the person knowingly or intentionally: (1) commits family violence . . . ; [or] (2) communicates . . . directly with a protected individual or a member of the family or household in a threatening or harassing manner[.]

TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 2008)

. . . A person commits [assault] if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; . . . or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. CODE CRIM. PROC. ANN. art. 17.292
(Vernon Supp. 2008)

(a) At a defendant's appearance before a magistrate after arrest for an offense involving family violence or an offense under Section 22.011, 22.021, or 42.072, Penal Code, the magistrate may issue an order for emergency protection[.] . . .

(c) The magistrate in the order for emergency protection may prohibit the arrested party from: (1) committing . . . family violence or an assault on the person protected under the order; . . . [or] (2) communicating . . . directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner[.]

(m) In this article . . . "[f]amily," "family violence," and "household" have the meanings assigned by Chapter 71, Family Code.

TEX. FAM. CODE ANN. § 71.0021 (Vernon 2008)

. . . "Dating violence" means an act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

TEX. FAM. CODE ANN. § 71.004 (Vernon 2008)

"Family violence" means:

(1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself; . . . or

(3) dating violence, as that term is defined by Section 71.0021.

STATEMENT OF THE CASE

Noel Villarreal, the Petitioner, was indicted on a count of violating a protective order by committing an act of family violence. The District Court for the 297th Judicial District of Texas conducted a jury trial, which resulted in a guilty verdict.

Mr. Villarreal resided in Arlington, Texas, for several years prior to the commencement of this case. He operated several businesses at the time. In January 2005, Mr. Villarreal met Shannon Love, the complaining witness. The two began dating, and soon they saw each other on a daily basis. Mr. Villarreal and the complaining witness were never married and never resided together.

On February 8, 2005, the Arlington Municipal Court, pursuant to article 17.292 of the Texas Code of Criminal Procedure, issued a protective order against Mr. Villarreal. TEX. CODE CRIM. PROC. ANN. art. 17.292 (Vernon Supp. 2008). The order listed the complaining witness as the person being protected. The order was valid for 61 days, and it, among other things, prohibited Mr. Villarreal from harassing or threatening the complaining witness and going within 300 feet of her residence and place of employment. The order also prohibited Mr. Villarreal from committing "family violence." The family violence provision did not reference any particular person.

The protective order contained the following definitions:

> *Family violence* means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself. *Family violence* includes physical injury that results in substantial harm to the child or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm.
>
> *Family* includes individuals related by blood or marriage, individuals who are former spouses of each other, individuals who are the biological parents of the same child, without regard to marriage, and a foster child and foster parent, whether or not those individuals reside together.
>
> *Household* means a unit composed of persons living together in the same dwelling, whether or not they are related to each other. Member of a household includes a person who previously lived in a household.

Significantly, the protective order's definition of "family violence" excluded "dating violence." The Texas Code of Criminal Procedure allows magistrates some discretion in determining what to include in protective orders. TEX. CODE CRIM. PROC. ANN. art. 17.292(c) (Vernon Supp. 2008). A magistrate may prohibit "family violence." *Id.* Section 71.004 of the Texas Family Code provides a disjunctive list of acts that may constitute "family violence," and this list includes "dating violence," which, as the term suggests, involves violent conduct between individuals who are in a dating relationship. TEX. FAM. CODE ANN. §§ 71.0021, 71.004 (Vernon 2008). "Dating violence" does not involve members of the same family or household, who are covered by a separate provision. TEX. FAM. CODE ANN. § 71.004 (Vernon 2008). Thus, a magistrate, in issuing a protective order that prohibits "family violence," *may* include "dating violence" within the scope of "family violence," but a magistrate clearly has discretion in selecting which definition(s) of "family violence," if any, to include. TEX. FAM. CODE ANN. § 71.004 (Vernon 2008); TEX. CODE CRIM. PROC. ANN. art. 17.292(c), (m) (Vernon Supp. 2008).

In the present case, the magistrate did *not* include "dating violence" within the protective order's "family violence" definition. Thus, an act of "dating violence," which does not involve a member of the actor's family or household, does not fall within the scope of the protective order's family violence prohibition.

During the evening of March 1, 2005, the complaining witness met Mr. Villarreal at an establishment in Arlington known as Hot Rods & Hoggs. They ordered drinks, talked and danced, and they probably stayed there for several hours. At some point, the complaining witness left through a side door without telling Mr. Villarreal. Mr. Villarreal approached her in the parking lot as she was getting ready to drive away, but the record contains differing versions of what happened next. Police officers were dispatched to the scene, and Mr. Villarreal was arrested.

The state eventually charged Mr. Villarreal with the offense of violating a protective order. TEX. PEN. CODE ANN. § 25.07 (Vernon Supp. 2008). More specifically, the indictment alleged that Mr. Villarreal violated a protective order issued by the Arlington Municipal Court on February 8, 2005, in cause number 050008552 (herein referred to as "the protective order"), by committing an act of family violence against the complaining witness. The indictment did not allege that Mr. Villarreal violated the protective order by harassing or threatening the complaining witness. The indictment did not charge Mr. Villarreal with committing the offense of assault. The indictment did not reference any of the protective order's prohibitions other than the family violence provision.

It is beyond dispute that the complaining witness was not a member of Mr. Villarreal's family or household. Indeed, at trial, the prosecution conceded this point and argued that Mr. Villarreal committed

family violence because he committed "dating violence." Thus, the prosecution's theory of the case was that "dating violence" violates the protective order's family violence prohibition. But as noted above, an act of "dating violence" did *not* violate the family violence provision of the protective order.

On appeal, Mr. Villarreal has consistently maintained that the evidence is therefore insufficient under the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), to prove beyond a reasonable doubt that he committed an act of family violence in violation of the protective order, and that his conviction, consequently, violates the due process protection afforded him under the 14th Amendment to the United States Constitution. Mr. Villarreal initially raised this issue in the first appellate court that reviewed the case. That court, in affirming the conviction, reasoned simply that the definition section in the protective order was not actually part of the protective order. App. at 30-32; *see Villarreal v. State*, 286 S.W.3d 321, 328 (Tex. Crim. App. 2009); App. at 9-10. Thus, "dating violence" could be viewed as violating the protective order's family violence provision. The Texas Court of Criminal Appeals did not adopt this reasoning, but nonetheless found the evidence sufficient under the *Jackson* standard. *Id.* at 327-28; App. at 14. The apparent reasoning of the Court of Criminal Appeals is discussed below.

ARGUMENT

THE TEXAS COURT OF CRIMINAL APPEALS HAS RULED ON AN IMPORTANT CONSTITUTIONAL QUESTION IN A WAY THAT CONFLICTS WITH WELL-ESTABLISHED PRECEDENT, AND THIS RULING HIGHLIGHTS THE NEED FOR THE SUPREME COURT TO ADDRESS THE ISSUE OF HOW COURTS ARE TO DETERMINE WHETHER VARIANCES BETWEEN CHARGING INSTRUMENT AND TRIAL EVIDENCE VIOLATE DUE PROCESS PRINCIPLES.

The 14th Amendment's due process clause prohibits a criminal conviction except upon proof beyond a reasonable doubt of each essential element of the particular offense. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. CONST. amend. XIV, § 1. In assessing the sufficiency of an evidentiary record to support a conviction, a court should view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Moreover, in determining whether a conviction rests upon legally insufficient evidence in violation of the 14th Amendment's due process clause, a reviewing court should generally bind the government to its charging decision and theory of the case. Indeed, "[i]t is axiomatic that a conviction upon a charge not made or upon a charge not tried

constitutes a denial of due process." *Id.* at 314. Due process entitles a defendant to a meaningful opportunity to defend the charge(s). *Id.*; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

What happens when the prosecution presents evidence of criminal conduct that differs from the conduct alleged in the applicable charging instrument? A conviction in such a situation would seem to constitute a denial of due process. *Cole*, 333 U.S. at 202; *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937); *McCormick v. United States*, 500 U.S. 257, 269-70 (1991). Yet, in many cases, the Circuits have excused certain variances between charging instrument and actual proof. *E.g.*, *United States v. McMahan*, 744 F.2d 647, 649-51 (8th Cir. 1984) (ruling that differences between indictment and proof concerning the amount and date of subject loan were insignificant in case involving conviction of using extortionate means to collect an extension of credit); *United States v. Alexander*, 447 F.3d 1290, 1298 (10th Cir. 2006) (indictment need not specifically allege aiding and abetting so long as an underlying offense is charged); *Santellan v. Cockrell*, 271 F.3d 190, 197 (5th Cir. 2001) (upholding conviction when general nature of indictment permitted different theories of how defendant committed the underlying offense). In what circumstances should a court regard a variance as constitutionally insignificant?

It appears that the Texas Court of Criminal Appeals may have viewed the present case as an example of an immaterial variance between pleading

and proof. The Court of Criminal Appeals concedes that the subject protective order's family violence provision prohibited, by its terms, only acts involving family and household members. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009); App. at 12-13. The Court concedes that the complaining witness was not a member of Mr. Villarreal's family or household. *Villarreal,* 286 S.W.3d at 327; App. at 13. As noted above, the prosecution did not allege that Mr. Villarreal violated any of the protective order's other provisions. Yet, the Court found sufficient evidence to support Mr. Villarreal's conviction of violating the protective order by committing "family violence" against the complaining witness, even though the order itself and other trial evidence indisputably established that Mr. Villarreal could not have violated the protective order by committing "family violence" against the complaining witness. *Villarreal,* 286 S.W.3d at 328; App. at 13-14. The Court stated that Mr. Villarreal should have understood that the order prohibited him from committing violent conduct against the complaining witness. *Villarreal,* 286 S.W.3d at 328; App. at 13-14.

The Court of Criminal Appeals employed conspicuously flawed reasoning. The prosecution elected not to charge Mr. Villarreal with committing violent conduct against the complaining witness. It could have done so under Texas' assault statute. TEX. PENAL CODE ANN. § 22.01 (Vernon Supp. 2008). Further, the prosecution chose not to ask for a jury instruction on the offense of assault. Moreover, the prosecution

elected not to charge Mr. Villarreal with violating the protective order by communicating with the complaining witness in a threatening or harassing manner. TEX. PENAL CODE ANN. § 25.07 (Vernon Supp. 2008). Instead, the prosecution charged him with violating a protective order by committing an act of family violence, and, at trial, the prosecution maintained that "dating violence" violated the protective order's "family violence" prohibition.

The Court of Criminal Appeals found sufficient evidence to support the protective order conviction because the evidence, in the Court's view, either supported a conviction of a different charge or demonstrated a violation of a protective order provision other than the family violence prohibition. The Court's reasoning seems incompatible with due process principles. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused. . . ." *Cole*, 333 U.S. at 201. Surely due process prohibits a prosecutor from changing the applicable statutory section or subsection *after* the commencement of a criminal trial.

Nonetheless, the Court of Criminal Appeals' conclusion may find support in those opinions where variances between alleged conduct and trial evidence were not regarded as violating due process. While Mr. Villarreal argues that this matter is simply a case of

the state failing to prove an essential element of the offense, perhaps as a result of the charging decision, the Court of Criminal Appeals' opinion highlights the need for clarification from the Supreme Court concerning the issue of when a variance between allegation and actual proof violates due process, and in what circumstances such a variance is constitutionally insignificant.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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Dated: September 22, 2009

NOEL RONALDO VILLARREAL,
Appellant v. THE STATE OF TEXAS

No. PD-0984-08

COURT OF CRIMINAL APPEALS OF TEXAS

286 S.W.3d 321; 2009 Tex. Crim. App. LEXIS 525

April 29, 2009, Delivered
April 29, 2009, Filed

COUNSEL: For APPELLANT: MARC F. GAULT, FORT WORTH.

For STATE: DEBRA ANN WINDSOR, ASST. CRIM. D.A., FORT WORTH.

JUDGES: HOLCOMB, J., delivered the opinion of the Court, in which MEYERS, PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, JJ., joined. KELLER, P.J., did not participate. HERVEY, J., filed a concurring opinion, in which KEASLER, J., joined.

OPINION BY: HOLCOMB

OPINION

The principal question presented in this case is whether the evidence adduced at appellant's trial was legally sufficient to support his conviction for violation of a protective order. We hold that the evidence was legally sufficient, and we affirm the judgment of the court of appeals.

On June 30, 2006, a Tarrant County grand jury returned an indictment charging appellant with

violation of a protective order under Texas Penal Code § 25.07(a)(1).[1] The indictment alleged, in relevant part, that, on or about March 2, 2005, appellant:

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[1] At the time of appellant's offense, Texas Penal Code § 25.07(a)(1) provided, in relevant part, that "[a] person commits an offense if, in violation of [a protective] order issued . . . under Article 17.292, Code of Criminal Procedure, . . . the person knowingly or intentionally commits family violence." Texas Penal Code § 25.07(b), in turn, provided that, "[f]or the purposes of this section: 'Family violence' [has] the meaning assigned by Chapter 71, Family Code." In addition to those Texas Penal Code sections, the following Texas Family Code sections are relevant to our discussion:

§ 71.003:

> "'Family' includes individuals related by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, individuals who are former spouses of each other, individuals who are the parents of the same child, without regard to marriage, and a foster child and foster parent, without regard to whether those individuals reside together."

§ 71.004:

> "'Family violence' means:
>
> (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
>
> (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G), by a member of a family or household toward a child of the family or household; or

(Continued on following page)

"did intentionally or knowingly in violation of an order of the Arlington Municipal Court . . . issued on February 8th, 2005, . . . commit an act of family violence, namely intentionally causing bodily injury to Shannon Love, by striking her with his hand or pushing her with his hand, and said act of family violence was intended to result in physical harm, bodily injury or assault."

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(3) dating violence, as that term is defined by Section 71.0021."

§ 71.005:

"'Household' means a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other."

§ 71.006:

"'Member of a household' includes a person who previously lived in a household."

§ 71.0021:

"(a) 'Dating violence' means an act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.

(b) For purposes of this title, 'dating relationship' means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. . . ."

The indictment also alleged, for purposes of punishment enhancement, that appellant had two prior felony convictions.

Trial under the indictment was had before a jury on appellant's plea of not guilty. At the guilt stage of trial, the State presented five witnesses and several exhibits.[2] The State's witnesses included Rosalia Maddock, Judge of the Arlington Municipal Court and a magistrate of Tarrant County; Shannon Love, the complainant; David Paden, an eyewitness to the offense; Sidney Turner, a second eyewitness to the offense; and Greg Wilkinson, an Arlington police officer.

The State's evidence, viewed in the light most favorable to the jury's verdict, and reasonable inferences therefrom, established the following: In January 2005, appellant and Love began an intimate dating relationship. They maintained separate residences, but occasionally each of them spent the night with the other at the other's residence.[3] Their relationship eventually soured. On or about February 8, 2005, appellant was arrested for committing some type of family violence against Love.[4] Shortly after

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[2] Appellant presented no witnesses.

[3] There was no evidence presented at trial suggesting that appellant was ever a member of Love's family or household.

[4] The record does not reflect the nature of the family violence that appellant committed against Love on or about February 8, 2005.

appellant's arrest, he was taken before Judge Maddock. At that time, Judge Maddock, acting under Article 17.292 of the Texas Code of Criminal Procedure, issued an emergency protective order enjoining appellant, for a period of 61 days, from committing further family violence against Love and certain named members of her family. Judge Maddock gave a copy of the protective order to appellant and explained to him orally what it prohibited.[5] On March 2, 2005, just 22 days after Judge Maddock issued the protective order, appellant again committed family violence against Love, to wit: he assaulted and injured her in the parking lot of an Arlington bar.

The protective order, admitted in evidence as State's Exhibit Four, was two pages in length and entitled "Magistrate's Order for Emergency Protection – Family Violence." It stated, in relevant part, that:

> "On 2/8/05 [appellant] appeared before the undersigned Magistrate after [appellant's] arrest for an offense involving family violence and the Court at a post-arrest hearing as provided by Art. 17.292 of the Code of Criminal Procedure considered entering an Order for Emergency Protection on its own motion. . . .
>
> "After considering the evidence, the Court enters this Order to protect Shannon Love, who is the victim of the offense, and

[5] The record does not reflect whether appellant asked any questions about the protective order.

> the following named members of the victim's family or household. . . .
>
> "It is hereby ordered that effective immediately and for the next 61 days, [appellant] . . . is prohibited from committing family violence."

On page two of the protective order, below Judge Maddock's signature, the following definitions appeared:

> "*Family violence* means an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself. *Family violence* includes physical injury that results in substantial harm to the child or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm.[6]

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[6] The definition of "family violence" on page two of the protective order corresponded with the definition in Texas Family Code § 71.004 as it existed before September 1, 2001. Effective

(Continued on following page)

> "*Family* includes individuals related by blood or marriage, individuals who are former spouses of each other, individuals who are the biological parents of the same child, without regard to marriage, and a foster child and foster parent, whether or not those individuals reside together.
>
> "*Household* means a unit composed of persons living together in the same dwelling, whether or not they are related to each other. Member of a household includes a person who previously lived in a household." (Emphases in original.)[7]

The trial court, in its jury charge, instructed the jurors that "a person commits the offense of violation of a protective order if, in violation of an order issued under Article 17.292, Code of Criminal Procedure, he knowingly or intentionally commits family violence and the person has violated the protective order by committing an assault." The court also instructed the jurors, over appellant's objection, that "'[f]amily

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September 1, 2001, the Texas Family Code definition of "family violence" included "dating violence." *See* footnote one, *supra*. It appears that whoever drafted the protective order used outdated computer software. On the bottom of each page of the protective order there appears a footer reading "famvio 09/97." That suggests that the software in question was created or last updated in September 1997.

[7] The language used in the protective order, taken as a whole, implies that appellant was a member of Love's family or household, but we suspect that that was simply a consequence of the drafter's use of outdated software. *See* footnote six, *supra*.

violence' means dating violence as hereinafter defined." The court then defined the terms "dating violence" and "dating relationship" in accordance with the definitions in Texas Family Code § 71.0021. *See* footnote one, *supra*.

The jury, after deliberating, found appellant guilty as charged in the indictment. The trial court, after hearing additional evidence, assessed appellant's punishment, enhanced by two prior felony convictions, at imprisonment for sixty years.

On direct appeal, appellant brought three points of error, arguing that: (1) the evidence adduced at trial was legally insufficient to support his conviction, (2) the evidence adduced at trial was factually insufficient to support his conviction, and (3) the trial court erred in instructing the jury that "family violence" meant "dating violence" and in defining for the jury the terms "dating violence" and "dating relationship." With respect to his evidentiary-insufficiency points, appellant noted first that, "in [this] case, the protective order . . . limit[ed] the definition of 'family violence' to actions involving family and household members."[8] Appellant then argued:

> "No rational trier of fact could have found, beyond a reasonable doubt, that [he] committed an act against a member of his family or household.[9] Consequently, no

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[8] *See* footnotes six and seven, *supra*.

[9] *See* footnote three, *supra*.

> rational trier of fact could have found, beyond a reasonable doubt, that [he] violated the protective order's prohibition against committing family violence. If evidence of such a violation does exist . . . , it is so weak that the verdict seems clearly wrong or manifestly unjust, and the verdict is against the great weight and preponderance of the evidence."

With respect to his jury-charge point, appellant argued that the trial court erred because "the protective order excluded dating violence from [its] definition of family violence, and [evidence of] dating violence, therefore, is not sufficient to support a conviction for violating the protective order's family violence prohibition."

The court of appeals overruled appellant's points of error and affirmed the trial court's judgment of conviction. *Villarreal v. State*, No. 02-06-00393-CR, 2008 Tex. App. LEXIS 3866 (Tex.App.-Fort Worth 2008) (not designated for publication). With respect to appellant's evidentiary-sufficiency points, the court of appeals first rejected his argument that the protective order limited the definition of "family violence" to actions involving family and household members and that, therefore, evidence of dating violence was insufficient to support a conviction for violating the protective order's prohibition of family violence:

> "Appellant argues that the protective order prohibited him from committing family violence as it regards members of the same

> household and members of a family but not family violence in terms of dating violence. Appellant is correct that the definition contained in State's Exhibit Four, the magistrate's order for emergency protection family violence, does not include the definition of family violence in terms of dating violence. The portion of the 'order' to which Appellant refers, however, is the portion appended after the order itself and after the requisite warning. It is part of neither the order nor the warning, and Appellant has directed us to no authority providing otherwise." *Id.* at 5 (footnotes omitted).

The court of appeals then explained that the State's burden at trial was to prove that appellant intentionally or knowingly, in violation of a protective order, committed an act of "family violence" as that term was defined in the Texas Family Code. *Id.* at 6-7. Finally, the court of appeals, after reviewing the evidence presented at trial and after summarizing the relevant law, stated, "Applying the appropriate standards of review, we hold that the evidence is both legally and factually sufficient to support the trial court's judgment." *Id.* at 12 (footnote omitted).

With respect to appellant's jury-charge point of error, the court of appeals explained that the trial court did not err in instructing the jury on "dating violence" because "section 71.004 of the family code defines family violence, and subsection (3) of that section specifically includes dating violence as part of the definition of family violence." *Id.* at 13.

Appellant later filed a petition for discretionary review, asserting five grounds for review, all of which we granted. In his petition and accompanying brief, appellant reiterates the arguments that he made below: (1) the evidence adduced at trial was legally insufficient to support his conviction (grounds for review numbers one, four, and five), (2) the evidence adduced at trial was factually insufficient to support his conviction (ground for review number two), and (3) the trial court erred in instructing the jury that "family violence" meant "dating violence" and in defining for the jury the terms "dating violence" and "dating relationship" (ground for review number three).

We turn first to appellant's grounds for review arguing legal insufficiency. Consistent with the Fourteenth Amendment's guarantee of due process of law, a defendant may not be convicted and deprived of his liberty except upon proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In assessing the "legal" sufficiency of the evidence, under the Fourteenth Amendment, to support a conviction, an appellate court must consider all of the record evidence in the light most favorable to the verdict, and must determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found the defendant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In that analysis, the elements of

the offense are defined by the hypothetically correct jury charge for the case. *Malik v. State,* 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). "Such a charge [is] one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Ibid.*

The hypothetically correct jury charge for this case would state the elements of the charged offense as follows: (1) appellant (2) in violation of an order issued on February 8, 2005, by the Arlington Municipal Court under Article 17.292, Code of Criminal Procedure (3) at a proceeding that appellant attended[10] (4) knowingly or intentionally (5) caused bodily injury to Shannon Love by striking her with his hand or pushing her with his hand (6) and said act was intended to result in physical harm, bodily injury, or assault. Appellant argues that, given the evidence adduced at his trial, no rational jury could have found him guilty of the second element beyond a reasonable doubt. Appellant does not challenge the sufficiency of the evidence to support the other elements. He points out correctly that the definition of "family violence" on page two of Judge Maddock's protective order is limited to acts involving members

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[10] *See Harvey v. State,* 78 S.W.3d 368, 372-73 (Tex.Crim.App. 2002).

of a family or household and does not include dating violence. He also points out correctly that the evidence at trial showed that he and Love were in a dating relationship, as that term is defined in the Texas Family Code, and did not show that he was a member of Love's family or household.

We are not persuaded by appellant's argument. A rational jury, reading Judge Maddock's protective order as a whole, and considering it in the context of all the other evidence as well as the trial court's instructions regarding the meaning of "family violence,"[11] could have found the following facts beyond a reasonable doubt: (1) on or about February 8, 2005, appellant was arrested in Tarrant County for some type of family violence against his girlfriend, Shannon Love; (2) on that same date, Judge Maddock, of the Arlington Municipal Court, at a hearing that appellant attended, issued a protective order under Article 17.292 naming appellant as the subject and naming Love and her family as the protected parties; (3) Judge Maddock, on page one of the order, explicitly prohibited appellant from committing further "family violence" against Love or her family; and (4) despite the deficient definition of "family violence" on page two of the order, any reasonable person in appellant's position reading the protective order would have understood that it prohibited him from committing

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[11] The trial court's instructions were not erroneous, despite appellant's claim to the contrary. *See* discussion, *infra*.

violent conduct against Love or her family. From those facts, a rational jury could have further found, beyond a reasonable doubt, that appellant's violent conduct against Love on March 2, 2005, was "in violation of" the protective order.

Although we agree with the court of appeals that the evidence adduced at appellant's trial was legally sufficient despite the definition of "family violence" contained on page two of the protective order, we do not agree with the reasoning employed by the court of appeals. The court of appeals dismissed appellant's argument concerning the deficient definition simply by holding that that definition was not part of the protective order, whereas we conclude that the proper analysis is to determine whether a rational jury, despite the deficient definition, could conclude beyond a reasonable doubt that appellant's assaultive conduct on March 2, 2005, was in violation of the order.

We overrule grounds for review numbers one, four, and five.

We turn next to appellant's ground for review arguing factual insufficiency. Our state constitution allows the courts of appeals (and this Court in direct appeal of capital murder cases), upon request, to reverse a judgment of conviction and remand for a new trial when the evidence, although legally sufficient, is nevertheless too weak to withstand scrutiny or preponderates greatly against the finding of guilt. *Watson v. State,* 204 S.W.3d 404, 414 (Tex.Crim.App. 2006). Once a court of appeals has determined such a

claim of "factual" insufficiency, this Court may not conduct a de novo review of the lower court's determination. *Cain v. State,* 958 S.W.2d 404, 408 (Tex.Crim.App. 1997). Our review is limited to determining whether the lower court applied the correct standard of review and considered all of the relevant evidence. *Lancon v. State,* 253 S.W.3d 699, 704 (Tex.Crim.App. 2008). In the instant case, appellant asks us, in effect, to conduct a de novo review of the court of appeals's determination of his factual-insufficiency claim. We cannot do that. We therefore dismiss ground for review number two as improvidently granted.

We turn finally to appellant's ground for review arguing jury-charge error. As we noted previously, appellant complains that the trial court erred in instructing the jury, over his objection, that "family violence" meant "dating violence" and in defining for the jury the terms "dating violence" and "dating relationship." *See* footnote one, *supra.*

A trial court is statutorily obligated to instruct the jury on the law applicable to the case. Tex. Code Crim. Proc. art. 36.14. As Professors Dix and Dawson have explained, that statutory obligation "requires that each statutory definition that affects the meaning of an element of the offense must be communicated to the jury." G. Dix & R. Dawson, *Texas Practice: Criminal Practice and Procedure § 36.11* at 562 (2nd ed.2001). In the instant case, the grand jury, through its indictment, charged appellant with the offense of violation of a protective order, one element of which

was the commission of "family violence" as that term was defined by the Texas Family Code. Because the Family Code definitions of "dating violence" and "dating relationship" affected the meaning of the "family violence" element of the offense, the trial court did not err in instructing the jury on those definitions. We overrule ground for review number three.

We affirm the judgment of the court of appeals.

DELIVERED APRIL 29, 2009

PUBLISH

CONCUR BY: HERVEY

CONCUR

HERVEY, J., filed a concurring opinion in which KEASLER, J., joined.

CONCURRING OPINION

Whether appellant's conduct of striking Shannon Love in the parking lot of the Hot Rods and Hoggs bar is a Class A misdemeanor or a third-degree felony turns on whether this conduct violated the February 8, 2005, protective order.[1] Appellant claims that this conduct did not violate the February 8th protective

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[1] *See* § 25.07(a), TEX. PEN. CODE ("in violation of an order" is an essential element of the offense of violating a protective order).

order and, therefore, is not a third-degree felony because the protective order prohibited this conduct only against a member of appellant's "family or household" and Love was not a member of appellant's "family or household."[2] Appellant claims that his conduct is a Class A misdemeanor because he only dated Love and the protective order did not prohibit him from committing "dating violence."[3]

The magistrate signed the protective order at a hearing during which appellant personally appeared after his arrest "for an offense involving family violence." The protective order states that it was intended to protect "**SHANNON LOVE,** who is the victim of the offense." (Emphasis in bold and capitalization set out in the protective order). Its stated definition of "family violence" prohibited appellant from committing "family violence" only against a member of his "family or household." The protective order also prohibited appellant from "**communicating in a threatening or harassing manner directly with SHANNON LOVE.**"[4] (Emphasis in

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[2] *See* § 71.004, TEX. FAM. CODE (defining "family violence").

[3] *See* § 71.0021, TEX. FAM. CODE (defining "dating violence").

[4] This apparently would include a prohibition against striking Love even without a consideration of the legal effect of the protective order's omission of "dating violence" in its definition of "family violence." *See Schmidt v. State*, 232 S.W.3d 66, 67 (Tex.Cr.App. 2007) (actual striking can also constitute a threat to harm).

bold and capitalization set out in the protective order).

The magistrate (Judge Maddock), who signed the protective order, described the procedure "in giving notice that a protective order has been issued."

> Q. [STATE]: Now, we were talking about the standard procedure that you have in giving notice that a protective order has been issued. Can you take the jury through that now?
>
> A. [JUDGE MADDOCK]: Sure. When I do what we call magistration or arraignment, which is arraignments, that's what we blanket call it because it's a Class C. Again, it's actually the arraignment process. And I'm reading them why they're being held, what their charges are. If someone is also having a protective order, then I issue them the protective order at that point in time.
>
> And what I would have done in this case is, Mr. Villarreal, please – I've entered a protective order and for the next 61 days, please do not go within 300 feet of any residence, business, or place of employment of Shannon Love. Specifically do not go within 300 feet of 2701 Jewell Drive, Arlington, Texas 76016, or 608 East Division, Arlington, Texas 76011. In addition, in no way should you threaten or harass Shannon Love, Ashley Love, Robert Love, Donna Love, Misty Love, or Brandon Lindley. Finally, do not be in possession of a firearm. If you

violate any term of this protective order, you could find yourself with further charges pending against you. And that's how I do it day in, day out.

* * *

Q. And after you go through what the emergency protective order means and what is prohibited, is there any kind of acknowledgment that the person has to give?

A. Along with their copy, what happens is I make copies of – the original is on top of the file. I will make a copy and leave it in the folder, and I put it on top and I'll say, I need you to sign – and that would be the third page of this exhibit. Please sign the page I've given to you to acknowledge that I have given you your photocopy of the protective order.

Q. In State's Exhibit 4, there is an acknowledgment page, is there not?

A. Yes, there is.

Q. And is it signed?

A. It is signed by – I signed it down at the bottom at the return and at the top it is signed by Mr. Villarreal.

* * *

Q. And who is the person who is protected in that protective order?

A. Shannon Love and then the children that I called out and the parents.

Q. What type of protective order is this?

A. This would have been issued – could have been for a Class A or – this type of protective order could have been for a Class A or for a felony assault.

* * *

Q. And when we were talking in general terms about protective orders earlier, you were telling us that not all contact is prohibited, so that the parties, Mr. Villarreal and Shannon Love, would have been able to meet at a mutually agreeable place?

A. Yes.

Q. What is prohibited is any assaultive behavior at that place?

A. Right.

Q. If like in this instance Mr. Villarreal, when he received his emergency protective order, if he had had questions about that, is that something you would have addressed?

A. Yes.

Q. And do you have any notations or anything to indicate that he had any questions about what he was being given?

A. No.

The evidence supports the theory upon which the case was submitted to the jury – that appellant and Love had recently been or were dating when appellant

struck Love in the parking lot of the Hot Rods and Hoggs bar, where they had been drinking most of the evening. There is no evidence that Love was or had been a member of appellant's "family or household" when this occurred.[5]

Appellant claims that he could not have violated the protective order because its definition of "family violence" did not include "dating violence," which is the theory upon which he was convicted. Appellant argues that the sufficiency issue is whether "the relevant definition of family violence is found in the protective order" and not whether the evidence would support a finding that appellant "engaged in conduct that might be covered by one or more definitions" of "family violence" contained in the provisions of the Family Code.

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[5] The indictment alleged that Love was a member of appellant's "family or household" (not that they had been in a dating relationship) when appellant struck her in the Hot Rods and Hoggs parking lot. Appellant challenged this facially valid indictment (in particular, the allegation that Love was a member of appellant's "family or household") through a motion to quash the indictment, which the trial court denied. The State claimed in response to appellant's motion to quash that it could establish appellant's guilt by showing either that appellant and Love were in a dating relationship or that Love was a member of appellant's "family or household." The State eventually abandoned the indictment allegation that Love was a member of appellant's "family or household" with the remaining allegation being that appellant violated the protective order by committing "family violence" against Love when he struck her in the Hot Rods and Hoggs parking lot.

> It is axiomatic, but worth noting, that the State must prove Mr. Villarreal actually violated the protective order; it is not sufficient to show only that Mr. Villarreal engaged in conduct that might be covered by one or more definitions contained in [the provisions of the Family Code]. In other words, even if there is evidence of family violence, the State must still prove that the complained of conduct violated the terms of the protective order. Thus, the relevant definition of family violence is found in the protective order, and the protective order's definition does *not* include "dating violence."

(Citations to authority and to the record omitted; emphasis in italics in original).

I agree that the statute defining the offense required the State to prove "that the complained of conduct violated the terms of a protective order."[6] The issue, therefore, is whether the terms of the protective order, despite containing a definition of "family violence" that was not applicable to appellant's and Shannon Love's dating relationship, was reasonably specific enough to prohibit appellant from striking Shannon Love. *See Harvey v. State,* 78 S.W.3d 368, 371 (Tex.Cr.App. 2002) ("procedure for the issuance of the [protective] order requires that the person to

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[6] *See* § 25.07(a) (defining offense of violation of a protective order); *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (evidentiary sufficiency measured against the substantive elements of the offense as defined by state law).

whom the order applies will have (or at least will have been given) notice of its terms").[7] If it was, then appellant is liable for the violation-of-a-protection-order offense for which he was convicted.

The protective order in this case clearly states that its issuance was necessary after appellant had been arrested for "an offense involving family violence" against Shannon Love. By specifically stating that the protective order was meant to protect Shannon Love and by specifically prohibiting appellant from, among other things, threatening and harassing Shannon Love, this protective order, despite any "defective" definition of "family violence," was reasonably specific enough to communicate to appellant that the protective order prohibited him from striking Shannon Love as he did on the night in question in the Hot Rods and Hoggs parking lot. That this protective order may not have informed appellant of the intricacies of the various definitions of "family violence" contained in the Family Code is of no consequence to the sufficiency analysis in this particular case.[8] The

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[7] *Compare Ex parte Rhodes*, 974 S.W.2d 735, 740 (Tex.Cr.App. 1998) (an element of a constructive criminal-contempt conviction is a reasonably specific order) (citing and relying on *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995)).

[8] Appellant does not claim, for example, that he relied on the "family violence" definition in the protective order to believe that he would only be liable for a Class A misdemeanor when he struck Love in the Hot Rods and Hoggs parking lot. It should be noted that the protective order in this case states that a "violation of this order by commission of an act prohibited by the order may be a felony punishable by a fine of as much as $4,000

(Continued on following page)

protective order was reasonably specific enough to communicate to appellant that the protective order was meant to protect Shannon Love from him which included a prohibition against striking her. For purposes of the sufficiency analysis in this case, that is all that was required.

I, however, disagree with the Court's opinion to the extent that it could be read as deciding that the protective order did not reasonably convey this information to appellant but that "any reasonable person in appellant's position reading the protective order" should nevertheless have gleaned this information. *See* Maj. op. at 10 ("despite the deficient definition of 'family violence' on page two of the order, any reasonable person in appellant's position reading the protective order would have understood that it prohibited him from committing violent conduct against Love or her family"). I also disagree with the Court's opinion to the extent that it suggests that the person to whom a protective order is directed must actually

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or by confinement in jail for as long as one year or both." This, however, reflects the punishment range for a Class A misdemeanor enhanced by a previous conviction for a "Class A misdemeanor or any degree of felony." *See* § 12.43(a), TEX. PEN. CODE. It does not reflect the punishment range for a third-degree felony. *See* § 12.33, TEX. PEN. CODE. In this case, appellant was convicted of a third-degree felony and he was sentenced, as an habitual offender with two prior felony convictions, to 60 years in prison. *See* § 25.07(g), TEX. PEN. CODE (offense of violating protective order is third-degree felony if the defendant "has violated the protective order by committing an assault"); § 12.42(d), TEX. PEN. CODE.

know the contents of the protective order in order to be liable for violating it. *See id.*[9]

With these reservations, I join the Court's opinion.

Hervey, J.

Filed: April 29, 2009

Publish

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[9] *See Harvey*, 78 S.W.3d at 373 ("The State does not argue that the appellant could be held liable without having some knowledge of the order. It does say that the Court of Appeals went too far in requiring that the appellant 'knew its provisions.' We think the State is right, for we find no such requirement in the procedures for protective orders. The requirements are only that the respondent be given the resources to learn the provisions; that is, that he be given a copy of the order, or notice that an order has been applied for and that a hearing will be held to decide whether it will be issued. The order is nonetheless binding on the respondent who chooses not to read the order, or who chooses not to read the notice and the application and not to attend the hearing."); *but see Rhodes*, 974 S.W.2d at 740 (an element of a constructive criminal-contempt conviction for violating a reasonably specific order is "the wilful intent to violate the order"); *Chambers*, 898 S.W.2d at 259.

NOEL RONALDO VILLARREAL, APPELLANT v. THE STATE OF TEXAS

NO. 2-06-393-CR

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

2008 Tex. App. LEXIS 2846

April 17, 2008, Delivered

COUNSEL: For APPELLANT: Marc Gault, Fort Worth, TX.

For APPELLEE: Charles M. Mallin, CHIEF APPELLATE DIVISION, Shelly Messerli, CRIMINAL DISTRICT ATTORNEY, Fort Worth, TX.

JUDGES: PANEL B: DAUPHINOT, GARDNER, and McCOY, JJ.

OPINION BY: LEE ANN DAUPHINOT

OPINION

MEMORANDUM OPINION[1]

A jury convicted Appellant Noel Ronaldo Villarreal of violating a protective order by committing an act of family violence. The trial court sentenced Appellant, who was charged as a habitual offender, to sixty years' confinement in the

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[1] *See* TEX. R. APP. P. 47.4.

Institutional Division of the Texas Department of Criminal Justice.

In three points, Appellant challenges the legal and factual sufficiency of the evidence and the jury instructions defining dating violence and dating relationship. Because we hold that the evidence is both legally and factually sufficient to support Appellant's conviction and that the trial court did not err by defining the terms for the jury, we affirm the trial court's judgment.

BACKGROUND FACTS

Appellant began dating the complainant in January 2005. On February 6, 2005, she obtained a protective order against him. On March 2, 2005, as the complainant was driving home from work, Appellant called her on her cell phone and told her to meet him or he'd "wrap [her] car around a telephone pole." Appellant was at that time in his truck, following her SUV. She suggested that they meet at Hot Rods and Hoggs, a bar. The complainant testified that when Appellant ordered her a drink, he told her to "drink it or wear it or have it knocked upside [her] head." She drank continually while she was with Appellant at the bar. Appellant also drank.

At some point, the complainant went to order another round of drinks and then went out the side door. She walked to her vehicle, got in, and started it, but before she could drive away, her head was

slammed against the steering wheel. She testified that she did not remember what happened after that.

A witness testified that as he got into his car to leave the bar, he saw a woman walk to her vehicle and saw a man walk up to her and begin hitting her. That witness went back to the bar and notified bar staff about the altercation in the parking lot. A bar employee restrained the assailant and called the police, who arrested the assailant, Appellant. The employee who restrained Appellant testified that after the altercation in the parking lot had been broken up, the complainant attempted to back her vehicle out of the parking space, and in the process, she backed into a parked van.

After Appellant's arrest, the complainant wrote a letter to the magistrate who had issued the protective order, asking her to lift the order. The complainant testified that she wrote the letter at Appellant's insistence and that she did so in the hope that he would then leave her alone. For the same reason, she testified, she also executed an affidavit of non-prosecution and told the grand jury that Appellant had not injured her, that she had hit her head getting into her car because she was drunk, that Appellant was only trying to help her that night, and that she was so drunk that she had not even realized that she had backed into another car. She testified that Appellant drove her to testify to the grand jury and that he told her what to say in her grand jury testimony.

The indictment contains a paragraph alleging that the complainant was a member of Appellant's family or household, but the State waived that paragraph and that allegation was never submitted to the jury. Consequently, except for the conclusory statement that Appellant committed an act of family violence, the indictment contains no allegation that the complainant was a member of Appellant's family or household or that a dating relationship had existed between the two. And although the jury was provided a definition of dating relationship and dating violence, the application paragraph did not require a finding of either a dating relationship or dating violence. Nor is there any allegation in the indictment that Appellant had been previously convicted of family violence, and the jury was not asked to find any prior convictions for family violence.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In challenging the legal and factual sufficiency of the evidence in his first two points, Appellant offers three arguments: (1) the evidence fails to establish that Appellant violated the terms of the protective order; (2) the State's contradictory evidence does not prove that an assault occurred; and (3) the evidence raises serious questions about the complainant's character for truthfulness.

Protective Order

Appellant argues that the protective order prohibited him from committing family violence as it regards members of the same household and members of a family but not family violence in terms of dating violence. Appellant is correct that the definition contained in State's Exhibit Four, the magistrate's order for emergency protection family violence, does not include the definition of family violence in terms of dating violence. The portion of the "order" to which Appellant refers, however, is the portion appended after the order itself and after the requisite warning.[2] It is part of neither the order nor the warning, and Appellant has directed us to no authority providing otherwise.[3]

Our review of the emergency protective order shows that it specifically names the complainant and the offense now before this court. It also names her parents and her children. The order prohibits Appellant's committing family violence and prohibits his communicating in a threatening and harassing manner directly with the complainant or a member of her family or household and from communicating a threat through any person to the complainant or members of her family or household. It also prohibits

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[2] *See* TEX. CODE CRIM. PROC. ANN. art. 17.292(g) (Vernon Supp. 2007).

[3] *See* TEX. R. APP. P. 38.1(h); *Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 1053, 121 S. Ct. 2196, 149 L. Ed. 2d 1027 (2001).

his going within three hundred feet of the residence, business, or place of employment of the complainant or member of her family or household protected under the order. It does not specify the type of family violence prohibited.

Appellant does not claim on appeal that the indictment is defective for failing to specify which kind of family violence he committed; that is, whether he committed family violence against a member of his family or household or whether he committed family violence against someone with whom he was or had been in a dating relationship, nor does he complain of the denial of any motion to quash the indictment.[4]

The State's burden on appeal was to prove that Appellant, intentionally or knowingly in violation of the protective order, committed an act of family violence. The statute defines family violence as

> (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

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[4] *See Teal v. State*, 230 S.W.3d 172, 182 (Tex. Crim. App. 2007).

> (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G), by a member of a family or household toward a child of the family or household; or
>
> (3) dating violence, as that term is defined by Section 71.0021.[5]

Section 71.0021(a) defines dating violence as

> an act by an individual that is against another individual with whom that person has or has had a dating relationship and that is intended to result in physical harm, bodily injury, assault, or sexual assault, or that is a threat that reasonably places the individual in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.[6]

Contradictory Evidence of Assault and Credibility of Complainant

Appellant argues that the State's contradictory evidence does not prove that an assault occurred and further contends that the evidence raises questions about the complainant's credibility. He also argues that the complainant's head could have slammed into the steering wheel when she hit the vehicle behind

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[5] TEX. FAM. CODE ANN. § 71.004 (Vernon 2002).

[6] *Id.* § 71.0021.

her, especially since she had no recollection of seeing Appellant in the parking lot.

It is not our place to resolve the conflicts in the evidence or to judge the complainant's credibility. In reviewing the legal sufficiency of the evidence to support a conviction, we view all the evidence in the light most favorable to the prosecution in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7] This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.[8] The trier of fact is the sole judge of the weight and credibility of the evidence.[9] Thus, when performing a legal sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the fact-finder.[10] Instead, we "determine whether the necessary inferences are reasonable based upon the

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[7] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

[8] *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton*, 235 S.W.3d at 778.

[9] *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000).

[10] *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000).

combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict."[11] We must presume that the fact-finder resolved any conflicting inferences in favor of the prosecution and defer to that resolution.[12]

Similarly, when reviewing the evidence for factual sufficiency, unless the record clearly reveals that a different result is appropriate, we must defer to the jury's determination of the weight to be given contradictory testimonial evidence because resolution of the conflict "often turns on an evaluation of credibility and demeanor, and those jurors were in attendance when the testimony was delivered."[13] Thus, we must give due deference to the fact-finder's determinations, "particularly those determinations concerning the weight and credibility of the evidence."[14]

The indictment alleges that Appellant violated the protective order by committing an act of family violence, namely "intentionally causing bodily injury to [the complainant], by striking her with his hand or pushing her with his hand, and said act of family violence was intended to result in physical harm,

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[11] *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).

[12] *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778.

[13] *Johnson v. State*, 23 S.W.3d 1, 8 (Tex. Crim. App. 2000).

[14] *Id.* at 9.

bodily injury, or assault. . . ." Although the State argues that the complainant ran to her car as fast as possible but, before she could drive off, Appellant opened her car door and slammed her head against the steering wheel, we cannot read her testimony in such a clear manner.

The complainant stated that she left the bar through a side door. As she was leaving the bar, she was alone and did not notice anyone else in the parking lot, although she was not really paying attention. Her intent was to get into her car and to run. She made it to her car and managed to open the door. She testified, "I got it into reverse." The prosecutor sought clarity, "So you actually were able to get to the car?" The complainant testified that she was just beginning to pull out with the car in reverse gear, when "the car door opened up and [her] head was slammed against the steering wheel." The complainant testified that she was probably drunk when she got into her car to leave. She did not remember backing into a van that was parked behind her. The complainant testified, when asked if she knew who had opened the door just before she struck her head, "Yes, it was [Appellant]." The complainant never specifically testified that Appellant slammed her head into the steering wheel; instead she testified that she had no personal recollection of what had happened.

The complainant admitted that she had signed a letter asking that the restraining order be lifted but testified that she did so only because Appellant

insisted that she do so and because she wanted him to go away and leave her alone.

The complainant also admitted that she had signed an affidavit of nonprosecution. At trial, however, she testified that she had signed it only "if it would make everything go away." She prepared a written statement that she sent to Appellant's now former defense counsel to prepare the affidavit of nonprosecution. She stated in that document,

> I . . . do hereby declare that on the night of the incident that [Appellant] was arrested in front of Hot Rods and Hoggs, that I was very intoxicated, that [Appellant] did not injure me in any way. My injuries occurred when I was trying to enter my vehicle and hit my head on the side of the car when I went to step in the vehicle. [Appellant] was not even present with me at the time.
>
> Furthermore, I was so intoxicated . . . that night that I also hit a parked car which I was not even aware that I hit until the police told me that I had hit another vehicle. There was not any reason for [Appellant] to be arrested during this incident. He was only trying to help me at the time because I had been injured. I am not fully sure why he even went to jail that night. We had agreed to meet that night to discuss our situation at a neutral place just as the judge told us to do. There was no malicious or physical conduct to justify his arrest.

The lawyer prepared the affidavit of non-prosecution and the complainant subsequently signed it. The affidavit provided,

> My name is [the complainant]. I am of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated, which are true.
>
> On the date this incident occurred, I was at Hot Rods and Hog[g]s with [Appellant]. I had invited him to meet me there. During the evening I became very intoxicated and walked out of the bar. [Appellant] did not even know that I had left.
>
> I walked out of the bar and was trying to enter my vehicle. While trying to step into my vehicle, I hit my head on the side/roof and fell to the ground.
>
> [Appellant] came out shortly thereafter. While he was trying to assist me, other individuals grabbed him and he was later arrested.
>
> I do not even know why he was arrested because at no time did he act maliciously or physically harm me.

Despite the complainant's earlier written statement and affidavit and her failure to remember how the head injury happened, another witness, David Paden, saw the assault. He testified that he saw a man attack a female who was trying to get into her car. The male came up behind the female and pushed her so that the woman hit her head on the doorjamb.

Paden went for help, and when he returned to the scene of the fight, he saw the female in the driver's seat turned sideways and the male was leaning over her trying to hit her with his fists and hands as she attempted to defend herself. Paden testified that the male who was subdued by the bar employees and arrested by the police was the same person he saw attack the female.

Applying the appropriate standards of review,[15] we hold that the evidence is both legally and factually sufficient to support the trial court's judgment and overrule Appellant's first two points.

JURY CHARGE

In his third point, Appellant contends that the trial court erred by including instructions in the jury charge that addressed dating violence and dating relationship. The indictment charged that Appellant committed an act of family violence against [the complainant] in violation of a protective order. The jury was charged that they could convict upon a finding of dating violence. As discussed above, section 71.004 of the family code defines family violence, and

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[15] *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton*, 235 S.W.3d at 778 (both providing legal sufficiency standard of review); *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006); *Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005); *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003); *Johnson*, 23 S.W.3d at 11 (all providing factual sufficiency standard of review).

subsection (3) of that section specifically includes dating violence as part of the definition of family violence. While the indictment might be subject to a motion to quash requiring the State to prove the nature of family violence, given that the statute provides three separate definitions of family violence,[16] Appellant does not complain that the trial court denied a motion to quash. It is well settled that a jury charge may not authorize a conviction upon a theory not alleged in the indictment,[17] but in this case there was a general allegation of family violence and no request for greater specificity.[18] The trial court did not err by charging the jury on dating violence and the dating relationship. We overrule Appellant's third point.

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[16] *See* TEX. FAM. CODE ANN. § 71.004.

[17] *Rodriguez v. State*, 18 S.W.3d 228, 232 (Tex. Crim. App. 2000); *Nunez v. State*, 215 S.W.3d 537, 542 (Tex. App. – Waco 2007, pet. ref'd).

[18] *See Ex parte Porter*, 827 S.W.2d 324, 327 (Tex. Crim. App. 1992) ("[A]bsent a motion to quash for lack of notice, the State is not required to allege in the indictment that the forged instrument 'purported to be the act of another who did not authorize the act' since such allegation does not constitute an element of the offense of forgery."); *Hall v. State*, 640 S.W.2d 307, 309 (Tex. Crim. App. 1982) (holding that when appellant fails to point out specifically how a more precise allegation was required for adequate notice, alleging attempted murder without specifying which type of murder under the statute is sufficient).

CONCLUSION

Having overruled Appellant's three points, we affirm the trial court's judgment.

LEE ANN DAUPHINOT

JUSTICE

PANEL B: DAUPHINOT, GARDNER, and MCCOY, JJ.

DO NOT PUBLISH

TEX. R. APP. P. 47.2(b)

DELIVERED: April 17, 2008

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6/24/2009
COA#: 02-06-00393-CR TC#: 1027326R
RE: Case No. PD-0984-08
STYLE: VILLARREAL, NOEL RONALDO

On this day, the Appellant's motion for rehearing has been denied. **PRESIDING JUDGE KELLER NOT PARTICIPATING**

Louise Pearson, Clerk